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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARC DAMON GROSSI,

Defendant and Appellant.

D050649

(Super. Ct. No. SCD186014)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed.

A jury convicted Marc Damon Grossi of second degree murder (Pen. Code, § 187, subd. (a)) and hit and run resulting in death (Veh. Code, § 20001, subds. (a) and (b)(2)). The trial court sentenced Grossi to a prison term of 15 years to life for the second degree murder conviction and a concurrent prison term of three years for the hit and run conviction. Grossi appeals, arguing the trial court violated his constitutional rights by excluding evidence of the victim's 1987 arrest for domestic violence. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

Jorge Negrete was standing beside his semitrailer on the shoulder of the freeway when Grossi struck Negrete with his pickup truck, pinning him against the semitrailer. He suffered extensive injuries to his torso and later died from these injuries.

After striking Negrete, Grossi merged onto the freeway and drove away. He passed a car being driven by Paul Chelminiak and stared at the car with an angry grimace. He also drove alongside a car being driven by Margaret Stayton. She and her passenger, Marceline Treadway, witnessed the impact and slowed down to help Negrete. However, Stayton could not change lanes and pull over because of the position of Grossi's truck. When Treadway instead took out her cell phone to summon help for Negrete, Grossi yelled at them, shook his fist at them, and held up his middle finger at them. Treadway described Grossi's facial expression as "just rage." Stayton described Grossi as livid and stated she had "never encountered that level of rage particularly from a stranger."

Nine days after the incident, a deputy sheriff found Grossi's truck parked in Encinitas. The truck's license plates were missing.

Defense Evidence

Grossi testified Negrete would not allow him to merge his truck onto the freeway ahead of the semitrailer so he "nonchalantly . . . put up the bird sign." Once Grossi entered onto the freeway, he tried twice to pass the semitrailer and both times Negrete prevented him from doing so by changing lanes and moving the semitrailer in front of

him. Grossi feigned a cell phone call to make Negrete think he was reporting Negrete's driving. Negrete then pulled over and stopped on the shoulder of the freeway. Grossi followed, hoping someone else had noticed Negrete's driving and would report it. Grossi did not want to report it himself because he did not have insurance for his truck.

After stopping on the shoulder, Negrete, who was 5 feet 10 inches tall and weighed 299 pounds, got out of the semitrailer, approached Grossi, and lifted his arms and fists at Grossi. Although Negrete never got close enough to start a fight, he scared Grossi and Grossi once again feigned a cell phone call. Negrete then went back around the right side of the semitrailer and Grossi decided to leave.

While waiting for a break in the traffic, Grossi glimpsed Negrete standing next to the semitrailer. He thought Negrete was angry and might swing at the truck as he passed by.

When Grossi saw a break in the traffic, he started moving the truck into the slow lane. At the same time, another car starting moving into the slow lane from the adjacent lane. Grossi swerved right to avoid a collision with the car and accidentally struck Negrete.

Shocked and scared Negrete might retaliate, Grossi continued along the shoulder, then moved back into the slow lane and left the scene. He drove to Encinitas where he removed the license plates from his truck and abandoned it.

Although Grossi admitted being upset by Negrete's driving, he denied being angry at Negrete. He also denied acting angrily or aggressively toward other drivers.

An ophthalmologist testified Grossi's right peripheral vision is limited because of a prior injury to his right eye socket. In addition, an accident reconstruction expert testified the physical evidence was consistent with the occurrence of a sideswipe glancing blow caused by counter steering to the right.

DISCUSSION

Before trial, the prosecution brought a motion in limine under Evidence Code¹ section 352 to exclude evidence of Negrete's 1987 arrest for willful infliction of corporal injury on a spouse or cohabitant. (Pen. Code, § 273.5, subd. (a).) Grossi opposed the motion, arguing the evidence was admissible under Evidence Code section 1103 to show Negrete was an aggressor and had a propensity for violence. The trial court granted the prosecution's motion, finding Negrete's propensity for violence in 1987 was not relevant to the incident between Grossi and Negrete.

Grossi contends the trial court's decision to exclude the evidence violated his due process right to present relevant defense evidence. More particularly, Grossi contends the evidence would have bolstered his testimony that Negrete had been behaving aggressively and, consequently, might have persuaded the jury he had been provoked and acted in the heat of passion, rather than with implied malice.

We review the trial court's ruling for abuse of discretion. (*People v. Richardson* (2008) 43 Cal.4th 959, 1000-1001.) While a defendant in a criminal case may present evidence of the victim's character or character traits to prove the victim's conduct, the

¹ Further unspecified statutory references are to the Evidence Code.

trial court has the discretion to exclude such character evidence if it is too remote to have any probative value. (§ 1103, subd. (a)(1); *People v. Gonzales* (1967) 66 Cal.2d 482, 499-500.) The trial court also has the discretion to exclude such character evidence if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448; *People v. Covino* (1980) 100 Cal.App.3d 660, 666.)

Nonetheless, if the character evidence has significant probative value to the defendant's case, the trial court's discretion to exclude the evidence under section 352 must yield to the defendant's constitutional right to present a defense. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Reeder* (1978) 82 Cal.App.3d 543, 552-553.) Conversely, if the character evidence is irrelevant or of only slight relevance to the defendant's case, exclusion of the evidence does not implicate any due process concerns. (*People v. Babbitt, supra*, at p. 685; *People v. Reeder, supra*, at pp. 552-553; see also *People v. Hall* (1986) 41 Cal.3d 826, 834-835.)

In this case, the evidence of Negrete's 1987 arrest did not have significant probative value to Grossi's case. Both parties acknowledge the only information known about the arrest besides its occurrence is that it resulted in a guilty plea to a misdemeanor. The circumstances of the arrest are not known because the records relating to the case were destroyed. Because of the age of the arrest and the lack of comparable factual information, the probative value of the evidence was, at best, only slight. This is

especially true since Grossi mainly presented an accident defense, not a heat of passion defense. Accordingly, we conclude the trial court did not abuse its discretion or violate Grossi's due process rights by excluding the evidence. Given our conclusion, we need not address Grossi's related arguments that Negrete's rap sheet was admissible under section 452.5 to prove the arrest and that the trial court's error was not harmless under *Chapman v. California* (1967) 386 U.S. 18, 24.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

HALLER, J.